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IN THE

Supreme Court of the United States

October Term, 1965

No. 413

Sheldon L. Pollack and Max E. Adams,

Petitioners,

vs.

Commissioner of Patents,

Respondent.

PETITION FOR REHEARING

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We respectfully petition for rehearing in the above matter on the following grounds, to-wit:

1. The Court, we believe, has overlooked important questions of constitutional and statutory law which should be decisive of this case, namely, the right to be heard fully and to examine and cross-examine witnesses on matters that decide important rights. Here, the right to a patent to protect inventors in earthquake country to be able to construct buildings protected against the ravages of nature (see photographs in our reply to opposition of government to petition for writ of certiorari) is involved. It is stated in *Powell v. Alabama*, 287 US 45, 77 L.ed. 158:

> "The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying

forms of expression in a multitude of decisions." (77 L.ed. 170).

2. The Court still has before it *Goodyear Tire & Rubber Co., et al., v. Commissioner of Patents*, No. 601, which raises a similar question and the government, in answer to that case, also called attention to our case.

3. We would respectfully ask the members of the Court to re-examine again our reply to the opposition of the government to our petition for certiorari in this case, No. 413, showing the damage of earthquakes to buildings which the Pollack and Adams method of construction is designed to overcome.

This case raises an important constitutional question which we believe this Court has overlooked and to which we did not previously call its attention, namely, that the power to create presumption is not a means of escape from constitutional restrictions.

New York Times Co. v. Sullivan, 376 US 254, at 284, 11 L.ed.2d 686, 84 Sup.Ct. 710

And see:

Bailey v. Alabama, 219 US 219, 239, 55 L.ed. 191, 200

The constitutional restriction against presumptions forbids even Congress from nullifying the right of due process of law and the right to have witnesses come before the court in a trial for a proper examination and a proper cross-examination. What has happened in this patent case is that the courts below have ignored this constitutional restriction on the Patent Office, requiring that Office, in the case of a trial *de novo*, to present witnesses for examination and cross-examination. This important right has been upheld as an important right of due process of law guaranteed, in the case of States, by the

Fourteenth Amendment, and in the federal government by the Fifth Amendment.

In adopting Section 145 of Title 35, U.S. Codes, authorizing a trial *de novo*, Congress certainly meant that *all* the witnesses should be produced and that a trial should not rest on a "presumption of validity" attaching to the Patent Office's adjudications where the Patent Office examiners, who make the adjudications, are not subject to examination or cross-examination either as to their qualifications or their past experience and no facts are shown upon which they based their determination against petitioners. Such a proceeding surely is contrary to constitutional restrictions of due process of law — a law which hears and sees before it condemns — and it is evident that there was Congressional intent to require such evidence to be produced at a trial *de novo* when Congress revised Statute 4915 of the Revised Statutes, which did not contain the words "trial *de novo*". These words certainly have a well known legal meaning in our courts and mean an entire new trial and not a trial resting on a presumption. Where witnesses are produced contrary to the presumption, the presumption disappears. Otherwise, the presumption becomes, as here, conclusive and destroys even a "trial *de novo*".

In the instant case, the government produced no witnesses, did not present any evidence from the Patent Office, did not present its technicians for examination or cross-examination, a basic requirement of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Paraphrasing the language of *New York Times Co. v. Sullivan, supra,* in a case involving the First and Fourteenth Amendments, where the Alabama court presumed malice, this Court said:

"Such a presumption is inconsistent with the federal rule. 'The power to create presumptions is not a means of escape from a constitutional restriction; Bailey v. Alabama, 219 US 219, 239, 55 L.ed. 191, 200, 31 S.Ct. 145. The showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff. ...." (376 US 284, 11 L.ed.2d 709)

Likewise, the showing of non-patentability, we believe, required for the forfeiture of the privilege of a patent is not presumed but is a matter for proof by the Patent Office. We respectfully submit that this Court has overlooked this important principle of constitutional law which applies equally to all departments of government.

The legal effect of a presumption has been universally held to be that it is dispelled when evidence is introduced which overcomes it and that presumption disappears.

Particularly in this case, the genius of invention of these inventors in connection with earthquake country has not been explored in any of the matters before the Patent Office. We think that very important principles are involved herein which have not been but should be reconsidered by the government. We think that the effect of this Court's decision in this case and in similar cases makes the Patent Office the judge, jury and executioner, too, as Gilbert and Sullivan have said in their famous play, The Mikado.

In Burrill and DeCamp's book on Inventions, Patents and Managements, page 521, it is stated:

"We have mentioned some reasons why the standard of patentability is not higher, such as the pressure of work on the examiners and the lack of adequate library facilities. The examiners' salaries are modest so that many leave the office to go into private practice just as they are becoming really expert."

We have no way of knowing whether the Patent Office in any way considered the proposed patent on the basis of its important utility, its importance in connection with earthquake country; there is no evidence that it did. We submit that we are entitled to have the case reheard on this basis.

We therefore respectfully petition for rehearing and reversal of the judgments and orders below.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioners

CERTIFICATE OF COUNSEL

I, Morris Lavine, counsel of record, do hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay and that it involves consideration of a case now pending, but undecided, which was not pending at the time the original petition for certiorari was filed and also involves other matters not previously called to the attention of the Court.

MORRIS LAVINE